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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 790

GWENDOLYN YOUNG HEYWORTH KOCH,
Petitioner,

vs.

MARGARET deKORWIN, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA deKORWIN, DECEASED ET. AL.,
Respondents.

REPLY BRIEF OF PETITIONER KOCH TO BRIEF OF RESPONDENT, deKORWIN, IN OPPOSITION TO PETITION FOR CERTIORARI.

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MAY IT PLEASE THE COURT:

This brief is filed on behalf of Gwendolyn Young Heyworth Koch in response to the brief of Margaret deKorwin in opposition to the petition for certiorari of this petitioner (No. 790) and the petitioners Pratt, *et al.* (Nos. 771, 772 and 773).

In treating the two petitions together, and erroneously referring to the "absolute resemblance" and "identical arguments" of the two petitions, respondent's brief attempts to conceal its total failure to attempt any reply to the specific charges in the Koch petition that the decision below affirmed a decree which purported to establish rights in absent parties who would not have been bound by an adverse decision and that the decision on

the merits plainly confused a specific local rule of property law which was directly applicable with a different and inapplicable general rule.

The brief ignores the substantial identity between the decrees in *Young* v. *Powell*, 179 F. (2d) 147 (C.A. 5th, 1950), where the decree purported to benefit absent parties, and in the instant case (Koch Pet., pp. 18-19, 21). The denial of certiorari in *Young* v. *Powell* on May 1, 1950 (No. 688, October Term, 1949), is not, as suggested (Resp. Br., p. 22), an answer to the instant petitions because the Court of Appeals reversed the decree in that case and its decision was manifestly correct.

THE ASSERTION THAT THE JURISDICTIONAL QUESTION WAS SETTLED BY PRIOR APPEAL (RESP. BR. pp. 3-13).

Respondent charges petitioners with "distortion" and "misrepresentation" and in support of the charges quotes at length from the original complaint (Resp. Br., pp. 4-6) to try to demonstrate that on the prior appeal plaintiff was claiming that the remainder interest of Stanislaus deKorwin (Stanley Young) was vested and that a portion of it passed to plaintiff by inheritance. Respondent's contention in this regard is wholly spurious.

In neither the original complaint nor the amended complaint was there any suggestion that plaintiff was suing as an heir of Stanley Young to establish the existence of a vested interest in Stanley as a deceased grandchild of Otto Young.* This is obvious from a reading of both com-

* The original complaint had named the five "absent parties" as defendants (Ruth Jacobi Young, individually and as administratrix, Evelyn Heyworth, Lawrence Heyworth, and Lawrence Heyworth, Jr.). When the issue was raised that a proper realignment of parties destroyed jurisdiction, plaintiff attempted to correct the defect by seeking to file an amended complaint which eliminated them as parties. Thereupon the trial court dismissed the case. Hence the right to proceed on the amended complaint was the point at issue on the first appeal.

plaints, as distinguished from respondent's selected quotations, and from an examination of the prayers for relief. On the contrary, all claims in both the original and amended complaint were premised on the express averment that the will provided for ultimate distribution of corpus "among all living grandchildren and the issue of any deceased grandchildren" (Stip. R. 480-481; R. Oct. term, 1946, No. 696, pp. 10, 13, 135, 139). This is wholly inconsistent with the theory first injected in the second amended complaint and upon which the case was tried, *i. e.*, that grandchildren had a vested interest, transmissible to their heirs upon death without issue (R. 142, 298).

Both complaints contained in paragraph (3) of Count II the language appearing on page 5 in which plaintiff was seeking to qualify as "one of the surviving issue, in the liberal, broad sense of the term, of a deceased grandchild" under the gift over to issue of deceased grandchildren. While the dubious claim (later abandoned, R. 132-148) that the word "issue" should be construed to mean "heirs" (thus making the original plaintiff an "issue" of his son) was only an incident to the principal claim that the will violated the rule against perpetuities, there is a critical difference between such a claim and a claim of a vested interest. If plaintiff took as "issue" he would take a fixed share of the trust in his own right as a beneficiary under the provisions of the Otto Young will. On the other hand, if the plaintiff took by inheritance on a vested theory, his claim would be essentially the claim of the deceased grandchild's estate, or derivative. Such a claim, like the claim in *Young* v. *Powell,* is, as pointed out in the Koch petition (p. 21), a two-stage claim, as distinguished from the facts involved in the various cases cited in respondent's brief (pp. 18-25) where the interests of co-heirs, co-beneficiaries or tenants in common were held separable.

There is therefore no substance whatsoever in plaintiff's

contention that the theory of the *second* amended complaint upon which the case was tried was merely a clarification of the prior allegations contained in the original complaint and the amended complaint (Resp. Br., p. 7), and therefore was before the court on the first appeal.

The question involved on the prior petition for certiorari was different for the further reason that the case at that time was up on the pleadings and no decree had been entered extending benefits and giving relief to absent parties in direct conflict with the decision in *Young* v. *Powell, supra.*

Even if respondent's ultimate theory were identical with its theory on the prior appeal, it would furnish no answer to the present petition, for the denial of the prior petition for certiorari was not an adjudication of the jurisdictional question by this Court. That the jurisdictional question is open for consideration after the trial of the case is demonstrated by this Court's decision in *Indianapolis* v. *Chase National Bank,* 314 U. S. 63 (1941), where the court granted certiorari and found that there was no jurisdiction after a trial on the merits, following a previous denial of certiorari on the jurisdictional question.

Respondent's Claim of Estoppel.

Equally without merit is respondent's apparent contention that petitioners allegedly agreed to plaintiff's shift to the vested theory set forth in the second amended complaint and that they are therefore foreclosed from now making any claim as to its effect on the jurisdictional question (Resp. Br. pp. 7-8). The order of June 18, 1949, to which respondent refers expressly provided that in defendants' respective answers to the second amended complaint any defenses theretofore raised and overruled need not be repeated as such defenses would be available to the

defendants in like manner and to the same extent as if pleaded over (R. 131). Furthermore, the answers of petitioners expressly preserved the defense of lack of jurisdiction (R. 186, R. 195, 199-200). Similarly, the petitioners assigned as error the lack of jurisdiction and the omission of indispensable parties and included the point in their briefs (R. 455, 465).

The Matter of the Petition for Rehearing.

There was no necessity for the filing of any petition for rehearing and the fact that the petition for rehearing which was filed was directed to the vested question (Resp. Br., p. 8) can in no way deprive the petitioners of the right to present the jurisdictional question as a basis for the granting of a writ of certiorari to clarify the conflict in the cases which now exists.

The Matter of Illinois Citizenship.

Respondent attempts to assert a technical failure of the record to show the Illinois citizenship of the persons having joint interests with plaintiff, *i. e.*, Ruth Jacobi Young, Evelyn Heyworth, Lawrence Heyworth and Lawrence Heyworth, Jr. (Resp. Br., pp. 9-10). Plaintiff failed to allege the citizenship of these persons when they were originally made parties. They were omitted from the affidavit of nonresidence filed by Mr. Aiken, plaintiff's attorney. All were apparently personally served and they appeared by their respective counsel and filed answers to the complaint (Stip. R. 480-481; R. Oct. term, 1946, No. 696, pp. 3, 32-33, 76, 95). When jurisdiction was challenged on the ground of their Illinois citizenship, plaintiff sought to dismiss them as parties. If they were not citizens of Illinois, there would have been no jurisdictional question on their realignment and there would have been no occasion for plain-

tiff to attempt to dismiss them as parties and to take the first appeal herein on the issue of their being indispensable parties.

Furthermore, in the case of the estates of the two deceased beneficiaries, administered in Illinois, the administrators would have to be Illinois citizens as respondent admits (Br., p. 9), and it is therefore immaterial that Ruth Jacobi Young, *ex parte* as far as this case is concerned, may have given up the administration of Stanley's estate some time after this suit was started because she was then supposedly "a citizen of Connecticut," as respondent states without benefit of record support.

The respondent does not seem to realize that if the absentees were not Illinois citizens, it would be elementary that the court could not have proceeded in their absence. The decision of the Court of Appeals on the first appeal, was, of course, predicated on the assumption that the absent parties were Illinois citizens but that since their presence would defeat the jurisdiction and the court could give limited relief in their absence, they were not indispensable. (*deKorwin* v. *First National Bank, et al.*, 156 F. (2d) 858).

THE ASSERTION THAT ALL PARTIES IN INTEREST ARE BEFORE THE COURT BECAUSE OF THE CLASS SUIT ALLEGATION (RESP. BR. pp. 13-17).

The assertion that four to six persons, as the case may be, constitute a class of persons so numerous that it is impracticable to bring them before the court is ridiculous. The fallacy of the contention is emphasized when it is considered that originally all four of the "absent" individuals were named as parties defendant and three of them had entered their appearance in the case (Rec. on prior pet. for cert., pp. 76, 95).

Plaintiff's contention falls with a mere statement of the

rule as laid down by this Court in *Hansberry, et al.* v. *Lee, et al.*, 311 U. S. 32 (1940), where it was stated (p. 41):

> "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree."

The argument was of course rejected by the Court of Appeals in the first appeal in its holding that the absent parties were not indispensable since limited relief could be given (156 F. (2d) 858). If the parties in question were present by representation the relief would not have to be limited. The parties would be before the court and their rights could be determined or annulled.

In the assignments of errors petitioners charged lack of jurisdiction and absence of indispensable parties. If the trial court's opinion expressed the erroneous impression that absent parties were before the court by representation (Resp. Br., p. 15) and had it been necessary to specify this as error, the above assignments were a proper way of doing so assuming, as respondent asserts, that the existence of a class suit would cure the lack of diversity of citizenship and of indispensable parties.

Realizing that a case involving 4 or 6 so-called represented parties is far removed from the class suit doctrine, respondent argues that the class is potentially larger because other grandchildren might die without issue before the death of Mrs. Pratt (Resp. Br. p. 16). But the claim that grandchildren have vested or transmissible shares in the trust necessarily means that it is the grandchildren themselves who would have an interest and not their heirs or legatees. All of the fourteen living grandchildren were made parties-defendant and, consequently, were not represented by plaintiff. Eight of them appeared in the suit and took a position hostile to plaintiff and this action would be more fairly representative of the six not appearing than would plaintiff's claim.

THE ASSERTION THAT THE ABSENT PARTIES ARE NOT INDISPENSABLE (RESP. BR. pp. 17-25).

This topic of the respondent's brief (III) is the only portion which attempts to meet the petitions on the merits of the jurisdictional point. Yet it completely passes over the showing that the decision below is in conflict with *Young* v. *Powell* and other decisions in approving a decree that gave relief to absent parties (Koch Pet. pp. 15-19).

As previously noted, respondent also overlooks the fact that the plaintiff's claim was not simply a claim of one of several tenants in common or co-heirs, but was a two-stage claim by one heir asserting the ownership of his decedent or ancestor in the absence of other persons interested *in that same ownership* (See Koch Pet. p. 21). In this respect the claim is like that involved in *Young* v. *Powell* but unlike the numerous cases cited by respondent. The situation is different from a claim by one person to an interest in a trust in the absence of other persons having a similar claim. The other persons here do not have

merely similar claims but are participants in what is really the single claim of a deceased trust beneficiary, being participants in the estate of that deceased beneficiary.

The respondent (Resp. Br. p. 22) asserts that *Payne* v. *Hook,* 74 U. S. 425 and *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U. S. 33, which held co-heirs not indispensable, were distinguished by the court in *Young* v. *Powell* on the ground that "the plaintiff in the *Powell* case was endeavoring to enforce 'an indivisible right' of rescission." The fact is that the court in *Young* v. *Powell* did not distinguish these cases on the ground that rescission was involved but instead asserted the very distinction made in the preceding paragraph and in the Koch petition, saying that the plaintiff was enforcing "an indivisible right of an estate or of his co-heirs" (179 F. (2d) at p. 150). Respondent has in effect misquoted the court. *Young* v. *Powell* did not involve rescission of a contract but rather the recovery of $44,000 and certain real estate. It is submitted that the court noted the analogy to cases involving rescission primarily because the plaintiff was asserting the right of a decedent or of an estate which was an indivisible right.

Similarly in the instant case plaintiff was asserting that Stanley Young had a vested interest so that an interest in the Otto Young trust was an asset of Stanley's estate. The interest of Stanley or his estate could hardly be held to exist as to some persons interested in the estate and not as to other persons, just as a contract could hardly be held rescinded as to some parties and not as to others. It is not necessary to go beyond this in order to establish a conflict between the decision below and the decisions in *Shields* v. *Barrow,* 17 How. (58 U. S.) 130 and other rescission or contract cases.

Actually, however, there is no justifiable distinction between the construction of a trust instrument in such a

case as this, where the number and size of the shares is at issue, and the construction or rescission of a contract as far as the necessity of having all interested persons before the court is concerned. There is no more reason why the obligations of a trustee under the instant circumstances should be permitted to be declared as to some but not all persons than that the rights of contract obligors generally should be so declared.

Respondent's statement (Resp. Br. p. 20) that plaintiff had the right to omit even persons in the petitioners' position shows respondent's misunderstanding of this case and of the difference between it and the cases cited. In any suit raising the vested question in which grandchildren of Otto Young or the heirs or representatives of deceased grandchildren are omitted as parties (assuming in the case of deceased grandchildren that the decision could not validly be *res judicata* in favor of the absentees) a decision whether for or against the plaintiff would create an impossible situation because it would not be a decision *in rem* or one binding as between the defendants or as against absent parties (Koch Pet. p. 23). If the decision were the other way in a later suit, the trustee would be under inconsistent orders as to the character of the remainder interests and as to the number of shares in which the fund should be divided on termination of the trust. Respondent's suggestion (Resp. Br. p. 25) that this should be disregarded because the trust has not yet terminated and the evil day is in the future is obviously without merit.

The jurisdictional question cannot be disposed of by respondent's sweeping generality that "the rights of persons to participate in a trust fund, or an estate, founded upon their status as heirs, next of kin, legatees or devisees, or *cestuis*, are separable and divisible" (Resp. Br. p. 18).

They may be and they may not be, depending upon the facts and the rights being asserted, as demonstrated by cases previously cited (Koch Pet. pp. 23-24).

THE ALLEGED FEDERAL QUESTION (RESP. BR. pp. 25-27).

While there is actually no federal question involved in the case, it may be noted that the existence of a federal question would not confer jurisdiction to proceed in the absence of indispensable parties nor to enter a decree giving relief to absent parties. Even if the existence of a federal question may possibly have been germane on the first appeal (before the Illinois citizens were dismissed out), on the theory it might have cured the lack of diversity jurisdiction, for present purposes it cannot help respondent. (Actually if there were a federal question and this eliminated problems of citizenship, it is obvious, as hereinbefore shown, that the presence of the missing parties would be indispensable.)

There is no federal question involved, and this was recognized by the Court of Appeals on the first appeal. The question on the trusteeship point is a matter of the construction of the will and of local law. The first consolidation involved two state banks. If this consolidation was not effective to pass the trusteeship the second consolidation with a national bank is irrelevant. If the first consolidation passed the trusteeship, the only possible federal question would be whether the McFadden Act permitted the national bank to take over the trusteeship the same as if the consolidation had been with a state bank. This "question" was settled in *Ex Parte Worcester County National Bank*, 279 U. S. 347, 359-60 (1929) where the court upheld the constitutionality of the Act on the ground that it was not directory or compulsory but merely permissive,

and validly so, in the sense of authorizing the succession to trusteeships where permitted by state law. That being so it was no longer a basis for federal jurisdiction. *Water Service Co.* v. *Redding*, 304 U. S. 252, 255 (1938).

THE FUTURE INTEREST QUESTION (RESP. BR. pp. 28-33).

Nothing in *Spiegel* v. *Commissioner*, 335 U. S. 701 (1949), alters the proposition that the decision of an important issue of local law in a manner in conflict with local decisions remains as one of the grounds for the issuance of the writ. If any inference as to the correctness of the decision is to be drawn from the personnel of the court (Resp. Br. pp. 28-29), it should be noted that of the two Illinois lawyers on the Court of Appeals, Finnegan, J., who dissented on the vested-contingent question, had recently been appointed to the court after long experience as a chancellor hearing equity cases in Cook County.

It is noteworthy that the entire remainder of this portion of the brief consists of quotations from the opinions below without any attempt to support the opinions independently. Respondent's brief is devoid of any attempt to answer the clear showing in this petitioner's petition that it is obvious from the majority opinion of the Court of Appeals, when compared with the cases cited, that the court misunderstood the cases and confused a specific rule which was directly applicable with a different though related general rule.

The errors in the two opinions quoted by respondent have been sufficiently pointed out in the petition (Koch Pet., pp. 26-35). The District Court's statement that only New York cases were cited in *People* v. *Byrd* is only partially corrected by the observation of the Court of Appeals that the court in the *Byrd* case held the law of the two states to be the same. The fact is that the Illinois

Supreme Court in establishing the rule applicable here held that the phrase in question was a clear expression of meaning and that resort to decisions was unnecessary and the citation of New York cases was only to show that there was nothing to the contrary in the law of New York.

RESPONDENT'S CONCLUSION.

Under the heading of "Conclusion" respondent (Br., p. 34) makes some additional jurisdictional arguments based largely on the Federal Rules of Civil Procedure, which, of course, do not extend or limit jurisdiction (Rule 82).

Respondent erroneously starts with the premise that Rule 21 provides that a nonjoinder of parties is not ground for dismissal of an action. The rule, which is only effective as declaratory of the law, does not provide that failure to join indispensable parties is not ground for dismissal. It refers to misjoinder rather than nonjoinder.

Respondent refers to the separate enumeration in Rule 12(b) of "lack of jurisdiction over the subject matter" and "failure to join an indispensable party." Reference is then made to Section 2105 of the Judicial Code providing that there shall be no reversal for error in ruling upon matters in abatement which do not involve jurisdiction. From this, respondent argues that even if the chancellor erred in his ruling upon the failure to join indispensable parties, such error could afford no basis for reversal in this Court.

Obviously the fact of separate enumeration in the rules is not incorporated in any way in Section 2105 of the Code and is not a guide to its interpretation. It is well established law that even where the point was not made at all in the court below, it is the "duty of the appellate court • • • to reverse and remand a case where indis-

pensable parties are missing." *Flynn* v. *Brooks*, 105 F. (2d) 766, 767 (C. A. D. C., 1939). Failure to join an indispensable party is a jurisdictional defect and this is true *a fortiori* where the citizenship of the absent indispensable parties destroys diversity jurisdiction, in which case there is not only a lack of jurisdiction for want of indispensable parties but a lack of diversity jurisdiction.

This petitioner renews her prayer for review of the above entitled causes by issuance of the writ for certiorari.

Respectfully submitted,

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